STATE OF MICHIGAN

COURT OF APPEALS

SARA GRIESBACH, as Next Friend of PATRICK GRIESBACH, Minor, and TIMOTHY GRIESBACH,

Plaintiffs-Appellees,

v

ROBERT R. ROSS, P.A.-C.,

Defendant-Appellant,

and

FRANK L. FENTON, D.O. and WALLED LAKE MEDICAL CENTER, P.C.,

Defendants.

UNPUBLISHED
May 22, 2008

No. 275826
Oakland Circuit Court
LC No. 2004-062028-NH

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant, Robert R. Ross, P.A.-C., appeals as of right the judgment in favor of plaintiffs in this medical malpractice action. Ross also challenges the trial court's order denying his motion for judgment notwithstanding the verdict. We reverse the order denying Ross's motion for judgment notwithstanding the verdict and vacate the judgment.

I. Basic Facts and Proceedings

On July 2, 2002, plaintiff Sara Griesbach took her 13-year-old son, Patrick Griesbach, to see Ross at defendant Walled Lake Medical Center, P.C. ("Walled Lake"). Patrick complained of pain in his right leg. Ross ordered an x-ray, urinalysis, and blood tests, diagnosed a pulled muscle, and prescribed Tylenol® or ibuprofen. During the night, Patrick's pain increased, and Sara took Patrick to see Ross on July 3, 2002. Patrick again complained of leg pain. Ross did not know why Patrick was experiencing such pain, and he diagnosed a severely pulled muscle and prescribed Tylenol® with codeine. Ross also ordered a deep vein thrombosis test, the result of which was normal. Ross told Sara that the results of the blood tests were all normal, although Patrick's sedimentation rate was elevated, which is an indicator of inflammation. Defendant, Dr. Frank L. Fenton, D.O., a board-certified family practice physician, supervised Ross at Walled

Lake. Fenton was not at Walled Lake during either of these visits, and although he was available by telephone or pager, Ross did not contact him. Ross did not suggest taking Patrick to the emergency room or consulting a specialist.

After seeing Ross on July 3, 2002, the Griesbachs went on a previously scheduled trip, and the pain medication helped Patrick at first. However, on July 5, the pain increased and Patrick began vomiting. On July 6, Patrick was in "tremendous pain", and the Griesbachs returned to Michigan and took Patrick to the emergency room. Patrick was initially diagnosed with juvenile rheumatoid arthritis, but he was ultimately diagnosed with osteomyelitis, an infection in the bone. Patrick suffered from necrosis of the head of his femur and irreversible destruction of the cartilage in his hip, requiring surgery.

Plaintiffs filed a notice of intent to file a claim ("notice of intent") regarding Fenton and Walled Lake and a complaint against Fenton and Walled Lake. After receiving from Fenton and Walled Lake a notice of nonparty at fault identifying Ross, plaintiffs filed a notice of intent regarding Ross and an amended complaint adding Ross as a defendant. Plaintiffs alleged that defendants committed negligence and malpractice in failing to diagnose osteomyelitis and refer Patrick to an orthopedist. Plaintiffs stipulated to dismiss Fenton and Walled Lake, and their claims against Ross proceeded to a jury trial. On the first day of trial, Ross orally raised a statute of limitations argument, and the trial court permitted him to file a written motion. Ross filed a motion for directed verdict, which the trial court denied. The jury found Ross 51 percent at fault, and the trial court entered a judgment in plaintiffs' favor. Ross moved for judgment notwithstanding the verdict, arguing that plaintiffs' claims against him were barred by the statute of limitations. The trial court denied this motion.

II. Motion for Judgment Notwithstanding The Verdict

Ross argues that the trial court abused its discretion in denying his motion for judgment notwithstanding the verdict because plaintiffs' claims against him were barred by the statute of limitations. We agree.

A. Preservation

Plaintiffs contend that Ross should be precluded from raising his statute of limitations issues on appeal because they were not properly raised before the trial court. Generally, to preserve an issue for appellate review, it must be raised by a party and addressed by the trial court. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Ross orally raised a statute of limitations issue on the first day of trial, and he filed a written motion for directed verdict, arguing that plaintiffs' claims against him were barred by the statute of limitations. The trial court denied this motion, and Ross raised the issue again in a motion for judgment notwithstanding the verdict, arguing the same statute of limitations issues he raises in this appeal. The trial court denied this motion. Therefore, these issues have been properly preserved for appellate review. *Id.*

B. Waiver

Plaintiffs claim that Ross waived his statute of limitations defense because he did not present exactly the same issues he argues on appeal until he filed his motion for judgment

notwithstanding the verdict. Pursuant to MCR 2.111(F)(3)(a), a party must "state the facts" constituting the affirmative defense of statute of limitations in its first responsive pleading or motion as permitted, and the party asserting the defense bears the burden of presenting supporting evidence. *Attorney Gen ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007), citing *Palenkas v Beaumont Hosp*, 432 Mich 527, 550; 443 NW2d 354 (1989). If a party fails to assert a statute of limitations defense in its first responsive pleading or motion as permitted, the defense is waived. MCR 2.111(F)(2). A party may also waive a statute of limitations defense by its course of acts and conduct. *Bulk Petroleum Corp*, *supra* at 665.

In his affirmative defenses, Ross asserted that plaintiffs' cause of action was barred by the applicable statute of limitations, and he incorporated the affirmative defenses asserted by Fenton and Walled Lake. In response to plaintiffs' initial complaint, Fenton and Walled Lake asserted that plaintiffs' claims were barred by MCL 600.5805 because they filed their lawsuit more than two years after the alleged malpractice and more than six months after they discovered or should have discovered the alleged malpractice. Plaintiffs assert that Ross's failure to raise this defense during the pretrial conference constitutes evidence of waiver. However, nothing in MCR 2.401(C) indicates that a failure to raise an issue at the pretrial conference constitutes waiver. Ross raised this defense again on the first day of trial. Plaintiffs correctly note that Ross did not specifically assert his underlying argument that the statute of limitations had expired because the notice of nonparty at fault regarding Fenton and Walled Lake did not toll the statute of limitations with respect to Ross. However, unlike the defendants' failure in *Bulk Petroleum Corp*, *supra* at 664-666, to assert any facts supporting the defense or cite to the applicable statute of limitations in their affirmative defenses, Ross asserted the defense in his affirmative defenses and incorporated the citation and facts presented by Fenton and Walled Lake in their affirmative defenses. Further, the defendants in *Bulk Petroleum Corp*, failed to raise the defense in response to the plaintiff's motion for summary disposition and stipulated to liability before asserting the defense, whereas Ross did argue that the statute of limitations barred plaintiffs' claims before trial began. *Id.* Given Ross's "direct assertion" of the statute of limitations defense, we cannot conclude that he waived this defense. *Burton v Reed City Hosp Corp*, 471 Mich 745, 748, 755; 691 NW2d 424 (2005).

C. Standards of Review

We review a trial court's ruling on a motion for judgment notwithstanding the verdict for an abuse of discretion. *Terzano v Wayne Co*, 216 Mich App 522, 525-526; 549 NW2d 606 (1996). This Court must "examine the testimony and all legitimate inferences that may be drawn therefrom in the light most favorable to the nonmoving party." *Id.* at 526. An abuse of discretion exists when the trial court's decision is outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). This Court reviews de novo questions of statutory interpretation, *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842, 849 (2006), the interpretation of court rules, *Knue v Smith*, 478 Mich 88, 92; 731 NW2d 686 (2007), and in the absence of disputed facts, questions regarding the applicability of a statute of limitations, *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006); *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 230; 561 NW2d 843 (1997).

D. Statute of Limitations

The statute of limitations for medical malpractice is two years. MCL 600.5805(6). Generally, a medical malpractice claim accrues at the time of the act or omission upon which the claim is based. MCL 600.5838a(1). The alleged malpractice occurred on July 2-3, 2002; therefore, the limitations period would expire on July 3, 2004. On April 29, 2004, plaintiffs filed a notice of intent regarding Fenton and Walled Lake pursuant to MCL 600.2912b(1), which provides, in pertinent part:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

Therefore, plaintiffs could not file a complaint against Fenton and Walled Lake until 182 days later, on October 28, 2004. MCL 600.5856(c) provides that the statute of limitations is tolled by this notice of intent for "the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." Therefore, plaintiffs' October 28, 2004, complaint against Fenton and Walled Lake was not barred by the two-year statute of limitations.

Fenton and Walled Lake filed a notice of nonparty at fault pursuant to MCR 2.112(K), identifying Ross, on January 26, 2005. On April 29, 2005, plaintiffs filed an amended complaint, adding Ross as a defendant. Given the two-year statute of limitations, this complaint was filed outside that period. However, MCL 600.2957(2) provides that a cause of action filed after a nonparty at fault is identified will not be barred by the applicable limitations period unless it would have been barred at the time the initial complaint was filed. Therefore, we must determine whether plaintiffs' cause of action against Ross would have been barred on October 28, 2004, when they filed their initial complaint against Fenton and Walled Lake.

Given that plaintiffs filed their complaint against Fenton and Walled Lake more than two years after the alleged malpractice occurred, their cause of action against Ross would have been barred on October 28, 2004, unless the statute of limitations is tolled or extended. Plaintiffs argue that their notice of intent regarding Fenton and Walled Lake tolled the statute of limitations with respect to Ross. In construing statutory provisions, this Court has stated:

> The principal goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. In determining intent, this Court first looks at the specific language of the statute. If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted, unless a literal construction of the statute would produce unreasonable and unjust results inconsistent with the purpose of the statute. In construing statutes, the court should avoid any construction which would render a statute, or any part of it, surplusage or nugatory. [*Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 258 Mich App 495, 499; 671 NW2d 144 (2003) (citation omitted).]

MCL 600.5856(c) provides that the applicable statute of limitations is tolled:

> At the time notice is given *in compliance with the applicable notice period under section 2912b*, if during that period a *claim* would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given. [Emphasis added.]

MCL 600.2957(2) provides:

> Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A *cause of action* added under this subsection is not barred by a period of limitation unless the *cause of action* would have been barred by a period of limitation at the time of the filing of the original action. [Emphasis added.]

Plaintiffs argue that the Legislature's use of the term "claim" in § 5856(c) and the term "cause of action" in § 2957(2) indicates an intent that these sections apply to claims, rather than individual parties. Under plaintiffs' construction, only one notice of intent would ever be required because it would provide notice to *all* potential defendants. Section 5856(c) requires that that the notice of intent must comply with the notice period of § 2912b. MCL 600.2912b(3) provides:

> The 182-day notice period required in subsection (1) is shortened to 91 days if all of the following conditions exist:
>
> (a) The claimant has *previously filed the 182-day notice* required in subsection (1) *against other health professionals or health facilities* involved in the claim.
>
> (b) The 182-day notice period has expired as to *the health professionals or health facilities described in subdivision (a)*.
>
> (c) The claimant has filed a complaint and commenced an action alleging medical malpractice against *1 or more of the health professionals or health facilities described in subdivision (a).*
>
> (d) The claimant did not identify, and could not reasonably have identified *a health professional or health facility to which notice must be sent under subsection (1)* as a potential party to the action before filing the complaint. [Emphasis added.]

Section 2912b(f)(6) prohibits the tacking of successive 182-day periods "irrespective of how many *additional notices* are subsequently filed for that claim and irrespective of *the number of health professionals or health facilities* notified." (Emphasis added.) Given these repeated references to other health professionals and notices of intent, it is clear that § 2912b contemplates the filing of an additional notice of intent with respect to other health professionals, thus creating a conflict with the construction of § 5856(c) urged by plaintiffs. "Statutes that relate to the same subject must be read together as one," and if this Court "can construe the two statutes so that they do not conflict, that construction should control." *Ross v Modern Mirror & Glass Co*, 268

Mich App 558, 563; 710 NW2d 59 (2005). We therefore reject plaintiffs' construction of § 5856(c).

Moreover, plaintiffs failed to identify Ross or state his name in the notice of intent regarding Fenton and Walled Lake, as required by MCL 600.2912b(4)(f). In *Rheaume v Vandenberg*, 232 Mich App 417, 418-419; 591 NW2d 331 (1998), the plaintiffs sought to sue a physical therapist whose name they did not know. The plaintiffs filed a notice of intent regarding a physical therapy center, naming "all agents, physicians, physical therapists, and/or employees" who had treated the claimant. *Id.* The plaintiffs filed a complaint naming "John Doe" as a defendant, and after learning the physical therapist's name, filed an amended complaint substituting the therapist's name for John Doe. *Id.* at 419-420. This Court held that the description contained in the § 2912b notice, without specifically providing the therapist's name, was not sufficient to toll the statute of limitations and the amended complaint was not timely filed. *Id.* at 423. Accordingly, we hold that the notice of intent regarding Fenton and Walled Lake did not toll the statute of limitations pursuant to § 5856(c) with respect to Ross.

Plaintiffs also rely on the discovery rule contained in MCL 600.5838a(2), which provides that a medical malpractice claim may be commenced within the two-year period provided in § 5805 or "within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." Plaintiffs bear the burden of proving that they did not or could not have discovered their claims within the statute of limitations period. MCL 600.5838a(2). Plaintiffs contend that they reasonably assumed that Ross had consulted with Fenton, which would discharge his duty under the standard of care for a physician's assistant. Indeed, a supervising osteopathic physician may "not delegate ultimate responsibility for the quality of medical care services, even if the medical care services are provided by a physician's assistant", MCL 333.17548(4), and a physician's assistant is an agent of the supervising physician, MCL 333.17078(1).

Plaintiffs assert that they could not have, through the exercise of reasonable diligence, discovered their claims against Ross until they learned from the notice of nonparty at fault that Ross had failed to consult Fenton. The standard applied in determining when a plaintiff should have discovered a claim is an objective one. *Solowy*, *supra* at 221. "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Id.* at 222. A plaintiff is aware of a possible cause of action "when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician." *Id.* at 232. The plaintiff does not need to be certain that he has a claim, or even know that he likely has a claim before the six-month period begins. *Id.*

In *Poffenbarger v Kaplan*, 224 Mich App 1, 12; 568 NW2d 131 (1997), overruled in part on other grounds *Miller v Mercy Mem Hosp Corp*, 466 Mich 196, 197-198; 644 NW2d 730 (2002), the plaintiff in a wrongful death action based on medical malpractice filed an amended complaint seeking to add additional defendants, including a doctor with whom the doctor treating plaintiff's decedent had consulted. This Court held that the plaintiff could not avail herself of the six-month discovery period in MCL 600.5838a, stating that, although the plaintiff may not have been aware of the consulted doctor's identity, his "identity does not alter [the plaintiff's] duty of diligence in discovering a potential cause of action. The discovery period applies to discovery of a possible claim, not the discovery of the defendant's identity." *Id.* Further, the plain language of § 5838a(2) states that the claim may be commenced when the claimant "discovers or should

have discovered the existence of the *claim*." (Emphasis added.) Notably, the Legislature used the term "claim", as opposed to the term "defendant".

The alleged malpractice occurred on July 2 or 3, 2002, and plaintiffs became aware of a possible cause of action against Fenton and Walled Lake, as evidenced by the April 29, 2004, notice of intent. Plaintiffs were aware that Ross provided the treatment, and there is no dispute that they never saw or spoke to Fenton on July 2 or 3, 2002. In fact, plaintiffs stated in their notice of intent regarding Fenton and Walled Lake that "a physician's assistant noted that [Patrick] had complaints of right leg pain . . . ." Irrespective of whether Ross had discharged his duty by consulting with Fenton, plaintiffs were aware of an injury and a possible causal link between the injury and an omission by Ross. See *Solowy*, *supra* at 232. Plaintiffs should have known that they had a possible cause of action against Ross, and the discovery rule does not apply in this case. The statute of limitations barred plaintiffs' claims against Ross. The trial court's decision denying Ross's motion for judgment notwithstanding the verdict falls outside the range of principled outcomes and thus constitutes an abuse of discretion. Accordingly, we reverse the trial court's order denying Ross's motion for judgment notwithstanding the verdict and vacate the judgment in favor of plaintiffs.

Ross also challenges the timeliness of plaintiffs' amended complaint, the admission of expert testimony, and the future damages award. Given our resolution of the statute of limitations issue, it is not necessary to address Ross's remaining issues.

Reversed and vacated. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette